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No. 86-1224

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL N. PION, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board abused its discretion by assigning to petitioner the burden of proving his continuing eligibility for civil service disability retirement benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8-A9) and the opinion of the Merit Systems Protection Board (Pet. App. A1-A7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1986, and the petition for a writ of certiorari was filed on January 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of 5 U.S.C. 8337 and 8347 are reproduced at Pet. App. A10-A12.

STATEMENT

1. Petitioner was employed by the Social Security Administration as a GS-10 social insurance representative. On April 29, 1977, the United States Civil Service Commission granted petitioner's application for civil service disability retirement benefits because of his poor eyesight. Eight years later, while petitioner was gainfully employed as a Senior Claims Examiner for the State of Rhode Island, the Office of Personnel Management (OPM) notified him that his disability annuity would be terminated. This notice was based on OPM's conclusion that petitioner's medical condition had improved to the point where he no longer was disabled within the meaning of the Civil Service Retirement Act, 5 U.S.C. 8337 (d).[1] OPM denied petitioner's request for reconsideration on July 25, 1985. Pet. App. A2.

2. Petitioner then sought review by the Merit Systems Protection Board (MSPB). In a decision dated September 25, 1985, a MSPB presiding official affirmed OPM's decision, holding that petitioner had failed to sustain his burden of establishing that he remained disabled from providing useful and efficient service in his former position (Pet. App. A1-A5). Specifically, the presiding official found that

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[1] Pursuant to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, responsibility for determining eligibility for disability retirement benefits was transferred from the Civil Service Commission to OPM. See 5 U.S.C. 8347.

petitioner's eyesight had improved significantly since his retirement (*id.* at A3):

> The agency submitted a June 17, 1985 letter from Dr. Paul Sydlowski, M.D., a specialist in Ophthalmology. Dr. Sydlowski indicated that [petitioner] had been his patient for eight years. In 1977 [petitioner's] vision was 20/400 and 20/200. Cataract surgery was performed in 1977. [Petitioner] had four other operations on his eye resulting in a 20/25 range in his one good eye (the other remained 20/400). He indicated [petitioner] could not drive because he was legally blind. He noted [petitioner] could be gainfully employed without reliance on his loss of peripheral field.

The presiding official also reviewed the evidence concerning petitioner's leg problem and concluded (*id.* at A3-A4):

> Based upon the record before me, I find that [petitioner] has not shown he is disabled for useful and efficient service in the position of Social Insurance Representative. Dr. Sydlowski indicated [petitioner's] eye problem would not keep him from being gainfully employed. Additionally, [petitioner's] leg problem did not prevent him from successfully working at a sedentary job for several years for the State of Rhode Island. [Petitioner's] former position of Social Insurance Representative is a sedentary position much like the position he has been performing with Rhode Island. Although [petitioner] credibly testified about the differences in the two jobs, this evidence is insufficient without medical evidence showing he was unable to perform the duties of his former federal position. Therefore, I find he has not shown that his medical prob-

> lem would keep him from performing his duties of Social Insurance Representative.

The full MSPB denied petitioner's petition for review on January 7, 1986 (Pet. App. A6-A7).

3. In a brief unpublished opinion dated October 31, 1986, the court of appeals affirmed the MSPB's decision (Pet. App. A8-A9). The court of appeals noted that, under *Lindahl* v. *OPM*, 470 U.S. 768 (1985), judicial review of MSPB decisions in civil service disability retirement cases is limited to determining "whether 'there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error "going to the heart of the administrative determination."'" Pet. App. A9 (quoting 470 U.S. at 791 and *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968)). In this case, the court concluded, "such an error has not been established" (Pet. App. A9).

ARGUMENT

The unpublished and nonprecedential decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals.[2] Nor does it present any issue of special importance warranting review by this Court. The Federal Circuit has exclusive jurisdiction to entertain appeals from MSPB decisions in civil service retirement cases. See 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9). Accordingly, judicial review of

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[2] Rule 18(a) of the Federal Circuit's Rules provides that "[o]pinions designated as unpublished shall not be employed as precedent by this court, nor may they be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case."

the procedures followed by the MSPB in its adjudication of such cases is a matter within the special competence of the Federal Circuit. This Court recently denied review of the Federal Circuit's decision sustaining the MSPB's general approach to the allocation of the burden of proof in civil service disability retirement cases. See *Lindahl* v. *OPM*, 776 F.2d 276 (1985), cert. denied, No. 85-6214 (May 12, 1986). There is no reason for a different disposition of petitioner's challenge to the particular application of that general approach in the context of an annuitant's continuing eligibility for benefits.

1. Petitioner contends (Pet. 5-18) that the MSPB acted arbitrarily and capriciously in following a rule of decision under which an annuitant bears the burden of establishing that he continues to be disabled. The adjudicatory approach that petitioner challenges, however, is fully supported by the text of the Civil Service Retirement Act and the opinions of this Court and the Federal Circuit in *Lindahl*. Moreover, that approach was followed by the MSPB's predecessor agency, the Civil Service Commission, and it was formally carried forward by the MSPB almost six years ago in *Prestien* v. *MSPB*, 8 M.S.P.R. 698 (1981). This established practice clearly is not arbitrary or capricious.

a. The MSPB's review of civil service disability retirement claims is governed by 5 U.S.C. 8347. Subsections (a) through (c) of Section 8347 provide for OPM to administer the retirement program, to prescribe regulations for that purpose, and to adjudicate claims. Subsection (d)(1) then provides that, "[s]ubject to paragraph (2) of this subsection," a decision by OPM on an application for retirement benefits "may be appealed to the Merit Systems Pro-

tection Board *under procedures prescribed by the Board*" (emphasis added). The emphasized phrase makes it clear that Congress did not impose rigid procedural rules upon the MSPB, but rather vested the Board with broad discretion to adopt such rules as it finds appropriate for the adjudication of civil service retirement cases. Accordingly, as the court of appeals correctly held in *Lindahl* v. *OPM*, 776 F.2d at 278-279, the MSPB was not barred by the Civil Service Retirement Act from allocating the burden of proof to the former employee in such cases.

This conclusion is confirmed by reference to paragraph (2) of Section 8347(d). That paragraph provides that the "procedures under section 7701" of Title 5 shall apply in a limited class of cases, namely, those in which the agency has filed an application for disability retirement of an employee based upon the employee's mental condition. One of the "procedures under section 7701" that is thereby incorporated is set forth in Section 7701(c)(1)(B), which permits the MSPB to sustain an agency's decision only if it is supported by a preponderance of the evidence; that provision has the effect of placing the burden of proof on the agency in hearings regarding adverse actions and similar cases governed by 5 U.S.C. 7701. Thus, when Congress enacted Section 8347(d)(2) in 1980, it determined that agency-initiated disability retirements based on an alleged mental impairment were sufficiently like adverse actions to warrant application of the same procedural protections that employees are afforded in adverse actions. See *Lindahl* v. *OPM*, 470 U.S. at 783-785. But Congress has refrained from imposing the burden of proof on the agency in any other civil service retirement cases. This omission strongly supports the reasonableness

of the MSPB's administrative decision not to impose the burden of proof on OPM in civil service disability retirement cases generally. Compare *United States* v. *Erika, Inc.*, 456 U.S. 201, 206-208 (1982).

b. In accordance with the text of the governing statutes, the Federal Circuit, on remand from this Court's decision in *Lindahl*, sustained the MSPB's practice of placing the burden of proof upon new applicants for retirement benefits. That policy in turn had been formally articulated by the Board in *Chavez* v. *OPM*, 6 M.S.P.R. 404 (1981). The Board there reasoned that (1) the governing statutes do not mandate any particular allocation of the burden of proof in retirement cases; (2) the longstanding administrative practice has been to place the burden upon the applicant to establish his eligibility for retirement benefits; (3) the burden of proof is properly placed upon the person seeking entitlement to a statutory benefit; and (4) it is reasonable to place the burden upon the applicant because he normally possesses or has ready access to the evidence relating to his medical condition. *Chavez*, 6 M.S.P.R. at 414-416. Moreover, as the court of appeals noted in *Lindahl*, if Congress had desired to alter the prior administrative practice and place the burden of proof upon OPM, Congress could easily have done so when it enacted the Civil Service Reform Act in 1978. See 776 F.2d at 279-280 (contrasting 5 U.S.C. 8347(d)(1) and (d)(2), discussed at page 6, *supra*). The fact that Congress declined to disturb the prior administrative practice lends additional support to the reasonableness of the MSPB's overall approach.

c. Consistent with its prior decision in *Lindahl*, the court of appeals in the instant case correctly

sustained the MSPB's conclusion that the burden of proof on the question of eligibility for disability retirement benefits should be allocated to the former employee, not only when he first applies for benefits, but also when his continuing eligibility is at issue. In following that approach in this case, the Board relied upon its earlier decision in *Prestien* v. *OPM*, 8 M.S.P.R. 698 (1981), where it reasonably determined that the rationale of *Chavez* also applies in the present context.

The MSPB noted in *Prestien* that the practice of the Civil Service Commission had been to require the annuitant to establish his continuing eligibility for benefits. 8 M.S.P.R. at 704.[3] In *Prestien*, as in *Chavez*, the MSPB found no indication that Congress intended to overturn that settled practice when it enacted the Civil Service Reform Act of 1978. See 8 M.S.P.R. at 704-705 & n.7. And in *Prestien*, as in *Chavez*, the Board reasonably concluded that it was fair to place the burden upon the annuitant because he has primary access to the evidence necessary to establish his continuing disability (8 M.S.P.R. at 704-705). Compare *United States* v. *New York, N.H. & H.R.R.*, 355 U.S. 253, 256 n.5 (1957).

d. The reasonableness of the MSPB's approach is further supported by administrative experience and

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[3] Petitioner asserts in passing (Pet. 13-14) that the Civil Service Commission in fact did not place the burden of proof on the annuitant to establish his continuing eligibility. However, petitioner offers no rebuttal to the MSPB's reading of the Commission's precedents. In any event, the assessment of the past practices of the responsible agency (and of its predecessor) is a matter properly committed to that agency's expertise, and petitioner has not shown that the MSPB's determination in *Prestien* was clearly erroneous.

congressional action under the Social Security disability program. This Court recognized in *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976), that that program places the burden on the claimant "to establish initial and *continued* entitlement to disability benefits" (emphasis added). The claimant's burden of proof in this regard is prescribed by 42 U.S.C. (Supp. III) 423(d)(5)(A), which provides that "[a]n individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."

Ignoring both *Mathews* v. *Eldridge* and Section 423(d)(5)(A), petitioner argues (Pet. 11-12) that the burden is on the Secretary of HHS to establish that the Social Security recipient has recovered from his disability. However, the cases cited by petitioner (*McAulay* v. *Heckler*, 749 F.2d 1500 (11th Cir. 1985); *Vaughn* v. *Heckler*, 727 F.2d 1040 (11th Cir. 1984); *Simpson* v. *Schweiker*, 691 F.2d 966 (11th Cir. 1982))—which have since been superseded (see pages 9-11, *infra*)—stood only for the proposition that under principles of administrative res judicata, the original finding of disability should control at a subsequent proceeding to review the claimant's continuing eligibility, in the absence of some evidence of medical improvement. Indeed, the court of appeals in *Simpson* specifically noted that the burden remained upon the annuitant to prove both initial and continuing eligibility for benefits (691 F.2d at 969).

Whatever the prior state of the law, however, the Social Security cases cited by petitioner do not take account of the amendments made by Section 2(a) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* (codi-

fied at 42 U.S.C. (Supp. III) 423(f)).[4] Those amendments prescribe detailed standards for review of the continuing eligibility of persons currently receiving disability benefits. As relevant here, the amendments provide, subject to certain exceptions, that an individual's benefits may be terminated only if there is substantial evidence that his medical condition has improved and that he is now able to engage in substantial gainful activity. 42 U.S.C. (Supp. III) 423(f)(1).

Significantly, however, although several courts had held before passage of the 1984 Act that a prior finding of disability created a presumption of continuing disability and shifted the burden to the Secretary to prove that the individual's medical condition had improved, that approach was rejected by Congress in 1984. Instead, Congress provided in the final paragraph of 42 U.S.C. (Supp. III) 423(f) that a determination regarding continuing disability shall be made "without any initial inference as to the presence or absence of disability being drawn from the

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[4] Two of the three appellate cases cited by petitioner, *Vaughn* and *Simpson*, were decided before the 1984 Act was signed into law on October 9, 1984. The third case, *McAulay*, was decided on January 8, 1985, but the court of appeals did not discuss the 1984 Act. Indeed, it would appear that the court of appeals in *McAulay* erred in even reaching the merits of the benefits termination issue. Under Section 2(d)(2)(C) of the 1984 Act, 98 Stat. 1797, any case that was pending in court on September 19, 1984, that raised the medical improvement issue was to be governed by the new statutory medical improvement standards in the 1984 Act, and *McAulay* therefore should have been remanded to the Secretary for review in accordance with those standards. See *Heckler* v. *Kuehner*, 469 U.S. 977 (1984); *Heckler* v. *Lopez*, 469 U.S. 1082 (1984).

fact that the individual has previously been determined to be disabled." In addition, the Conference Report emphasizes that determinations under the new substantive standards prescribed by the 1984 Act are to be governed by the same burden-of-proof standards that already were established by 42 U.S.C. 423—"[t]hat is, the claimant's obligations to establish the existence of his disability with regard to the CDI [Continuing Disability Investigation] proceeding are the same as his obligations with regard to an initial determination." H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 26 (1984).[5] The 1984 Act therefore superseded prior appellate decisions to the extent that they shifted to the Secretary the burden of proof or production on the question of whether the claimant's disability had ceased. See, *e.g.*, *Warren* v. *Bowen*, 804 F.2d 1120, 1121 (9th Cir. 1986).

In sum, as the foregoing discussion makes clear, the MSPB's determination in *Prestien* that the annuitant should bear the burden of establishing his continuing entitlement to civil service disability benefits is strongly supported by Congress's considered judgment to the same effect as regards continuing eligibility for Social Security disability benefits.

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[5] See also H.R. Rep. 98-618, 98th Cong., 2d Sess. 9 (1984) ("[T]he Supreme Court, in *Mathews* v. *Eldridge*, agreed with the agency that the burden of proving continuing eligibility for benefits was on the beneficiary."); *id.* at 11 (because the standards for termination of benefits were not set forth in the Act prior to 1984, SSA "ha[d] wide discretion to apply whatever standards it deemed appropriate"); S. Rep. 98-466, 98th Cong., 2d Sess. 10 (1984) ("[T]he Committee considered carefully and rejected the proposal to shift the burden of proof in eligibility determinations from the claimant to the Government once the individual is on the benefit rolls.").

e. Against this background, the MSPB's allocation of the burden of proof in this case was, at the very least, not arbitrary and capricious or an abuse of discretion, as petitioner contends (Pet. 6, 8, 18). Nor does it furnish a basis for setting aside the Board's decision under the standard of review endorsed by this Court in *Lindahl*, 470 U.S. at 791. The Board's decision in this case to *follow* the procedural approach previously used by it and by the Civil Service Commission prior to 1978 plainly does not constitute a " 'substantial *departure* from important procedural rights' " (470 U.S. at 791). Similarly, the MSPB's allocation of the burden of proof under a statute that on its face commits that matter to the Board's discretion entails no " 'misconstruction of the governing legislation' " (*ibid.*). Nor, finally, is there any error "going to the heart of the administrative determination" (*ibid.*), because there is nothing fundamentally unfair about requiring a person who seeks to receive future statutory benefits to bear the burden of establishing his entitlement to do so, whether or not he has received such benefits in the past.

2. Petitioner also challenges (Pet. 19-25) the MSPB's factual determination that he is not "disabled" within the meaning of the Civil Service Retirement Act. However, judicial review of that determination is expressly barred by statute. Under 5 U.S.C. 8347(c), OPM has the responsibility to "determine questions of disability," and the decisions of OPM on these matters "are final and conclusive and are not subject to review." In *Lindahl*, the Court construed this language to bar judicial review of "OPM's *factual* determinations about 'questions of disability' " (470 U.S. at 779 (emphasis in original)). See also 470 U.S. at 791 ("the factual under-

pinnings of § 8347 disability determinations may not be judicially reviewed"); *id.* at 779 n.12, 780, 787 n.22.

Petitioner seeks to avoid this bar by asserting that there is *no* evidence in the record to support the MSPB's decision in this case and that judicial review should be available with respect to that question notwithstanding the language of 5 U.S.C. 8347(c) and *Lindahl*. There is no merit to this argument. A disability retirement claimant may not avoid the bar to judicial review of the "factual underpinnings" of the administrative decision (*Lindahl*, 470 U.S. at 791) merely by asserting that are no factual underpinnings to support that decision. The Federal Circuit therefore has correctly rejected this and similar efforts to avoid the statutory bar in 5 U.S.C. 8347(c) and this Court's decision in *Lindahl*. See *Smith* v. *OPM*, 784 F.2d 397 (Fed. Cir. 1986); *Lee* v. *OPM*, 762 F.2d 987 (Fed. Cir. 1985); *Smith* v. *OPM*, 760 F.2d 244 (Fed. Cir. 1985). We note as well that where, as here, the burden is on the person seeking statutory benefits, it is not logically necessary for the record to contain evidence affirmatively showing that the former employee is *not* disabled, because, in appropriate circumstances, benefits may be denied solely on the ground that the former employee has not proved that he *is* disabled.

In any event, there in fact was medical evidence in the record before the MSPB that documented a significant improvement in petitioner's eyesight. Between the time of petitioner's retirement and the time of the termination of his disability annuity, his eyesight in one eye improved from 20/200 to 20/25, and petitioner's own ophthalmologist concluded that petitioner could be gainfully employed notwithstand-

ing his loss of peripheral vision (Pet. App. A3). Indeed, petitioner in fact was gainfully employed by the State of Rhode Island. The court of appeals therefore had no occasion to address petitioner's contention that review should be available in the *absence* of any evidence that petitioner is not disabled, and it did not purport to do so (*id.* at A9). That question therefore is not properly presented for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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